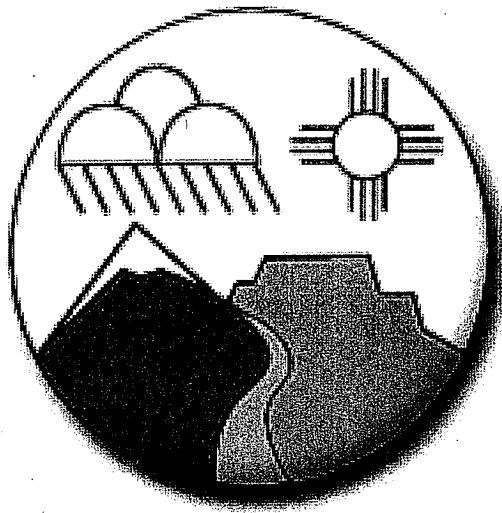


HAZARDOUS WASTE ACT

CIVIL PENALTY POLICY



HAZARDOUS WASTE BUREAU
NEW MEXICO ENVIRONMENT DEPARTMENT

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CONTENTS

| | | |
|-------|--|----|
| I. | INTRODUCTION..... | 2 |
| II. | EFFECTIVE DATE..... | 2 |
| III. | OBJECTIVE | 2 |
| IV. | PRINCIPLES FOR APPLICATION..... | 3 |
| V. | DISCLAIMER | 3 |
| VI. | CALCULATION OF CIVIL PENALTIES..... | 3 |
| A. | OVERVIEW | 3 |
| B. | MULTIPLE VIOLATIONS | 4 |
| C. | CIVIL PENALTY DETERMINATION | 4 |
| 1. | GRAVITY-BASED COMPONENT | 4 |
| 2. | MULTIPLE-DAY COMPONENT | 8 |
| 3. | ADJUSTMENT FACTORS | 9 |
| 4. | FINANCIAL CONDITION | 11 |
| 5. | ECONOMIC BENEFIT OF NONCOMPLIANCE | 12 |
| VII. | SETTLEMENT | 13 |
| A. | SETTLEMENT PROCESS | 13 |
| 1. | ESTABLISHING SETTLEMENT POSITION | 13 |
| 2. | RECALCULATING CIVIL PENALTY..... | 14 |
| B. | DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT | 14 |
| VIII. | SUPPLEMENTAL ENVIRONMENTAL PROJECTS | 14 |
| A. | SEP CATEGORIES..... | 15 |
| B. | SEP BENEFIT EVALUATION..... | 15 |
| IX. | RELEASE OF INFORMATION | 16 |
| X. | POLICY APPROVAL | 16 |

HAZARDOUS WASTE ACT CIVIL PENALTY POLICY

I. INTRODUCTION

The New Mexico Hazardous Waste Act (HWA), NMSA 1978, §§ 74-4-1 *et. seq.*, authorizes the Secretary of Environment to assess a civil penalty for violation of the HWA, the Hazardous Waste Management Regulations (HWMR), 20.4.1 NMAC, or the provisions of hazardous waste permits, and orders issued by the New Mexico Environment Department (Department) under the authority of the HWA and HWMR. Pursuant to section 74-4-10.B of the HWA, the Department may assess a civil penalty of up to \$10,000 per day of noncompliance for each past or current violation of any requirement of the HWA, any rule adopted and promulgated pursuant to that act or any condition of a permit issued pursuant to that act. Pursuant to section 74-4-10.C of the HWA, the Department may assess a civil penalty of not more than \$25,000 for each day of continued noncompliance with a compliance order issued pursuant to the HWA. Pursuant to section 74-4-13.B of the HWA, the Department may assess a civil penalty of not more than \$5,000 for each day of noncompliance with an imminent hazard order issued pursuant to the HWA or for each day the failure to comply with such an order continues.

This HWA Civil Penalty Policy (Policy) provides guidance to the Department's Hazardous Waste Bureau (HWB) in determining the amount of a civil penalty. This Policy is consistent with the U.S. Environmental Protection Agency's (EPA) December 2003 Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy. The HWB may use any policy or guidance in the EPA's RCRA Enforcement Policy and Guidance Compendium in calculating a civil penalty under this Policy (<http://cfpub.epa.gov/compliance/resources/policies/civil/rcra/>).

II. EFFECTIVE DATE

The Policy is effective upon signature by the Secretary of Environment.

III. OBJECTIVE

A primary purpose of enforcement is to deter noncompliance. Deterrence of noncompliance is achieved by: a credible likelihood of detection of noncompliance; a timely enforcement response; the likelihood and appropriateness of sanctions, including injunctions and civil penalties; and a perception of these factors in the regulated community.

The Policy is intended to ensure the appropriateness of sanctions in light of this purpose. Some specific objectives of the Policy are:

- (1) to ensure the fair and consistent determination of civil penalties;
- (2) to ensure imposition of civil penalties proportional to the gravity of the violation;
- (3) to recover the economic benefit of noncompliance with the HWA and HWMR; and
- (4) to provide a defensible basis for civil penalties in enforcement actions.

IV. PRINCIPLES FOR APPLICATION

The HWB applies the Policy in accordance with the following principles:

- (1) the HWB uses the Policy to determine the civil penalty in enforcement actions (including the settlement of such actions), except when the HWB seeks the statutory maximum civil penalty;
- (2) the HWB uses the Policy to argue for the highest, yet reasonable, civil penalty justified by the facts, except when the HWB seeks the statutory maximum civil penalty;
- (3) the HWB uses the Policy to recover the preliminary deterrent amount (see Section VI.A) and the economic benefit of noncompliance; and
- (4) the HWB does not adjust downward the civil penalty calculation except as authorized by the Policy.

The HWB makes aggressive assumptions regarding noncompliance based on the facts available at the time of the initial enforcement response. The HWB may revise these assumptions on the basis of facts discovered during the enforcement action.

V. DISCLAIMER

The Policy guides the HWB in determining the amount of a civil penalty for violation of the HWA and HWMR and is not binding on the HWB. The Policy does not create any right, duty, obligation, or defense in any person. The HWB may revise, amend, supplement, or revoke all or part of the Policy without public notice or comment.

VI. CALCULATION OF CIVIL PENALTIES

The civil penalty shall not exceed the statutory maximum as specified in the HWA. The statutory maximum may constitute the appropriate civil penalty for violations involving actual harm to human health or environment, willful violations, and other violations as determined in the sole discretion of the HWB. In assessing the penalty, the HWB shall take into account the seriousness of the violation and any good-faith efforts to comply with the applicable requirements.

A civil penalty that is lower than the preliminary deterrent amount undermines the deterrent effect of the civil penalty. The HWB shall apply this Policy to arrive at a final civil penalty that achieves deterrence.

A. OVERVIEW

The Policy establishes a four-step process for determining the amount of a civil penalty:

- (1) determine the gravity-based penalty amount;
- (2) add the multiple-day component;

- (3) adjust the sum of the gravity-based penalty amount and the multiple-day component (preliminary deterrent amount) to account for case-specific factors; and
- (4) add the economic benefit of noncompliance.

B. MULTIPLE VIOLATIONS

Some persons violate more than one requirement or violate the same requirement more than one time. The HWB assesses a separate civil penalty for each violation that results from an independent act or failure to act, and for each violation that is distinguishable from another violation. See also Section C.1.c.

A violation results from an independent act or failure to act or is distinguishable from another violation when the violation requires at least one element of proof not required to prove the other violation. For instance, the HWB may assess a separate civil penalty for each violation and add the amounts to determine the total civil penalty when:

- (1) the person violates a different requirement of the HWA or HWMR;
- (2) the person violates the same requirement of the HWA or HWMR on more than one occasion; or
- (3) the owner or operator violates the same or different requirement of the HWA or HWMR at different places.

Notwithstanding the above, the HWB may decline to assess separate civil penalties for the following types of related violations:

- (1) violation of a regulation and violation of a permit condition which repeats the regulation;
- (2) violation of more than one permit condition which imposes the same legal duty; and
- (3) violation of a state regulation or permit condition which imposes the same legal duty.

The HWB may also decline to calculate a separate civil penalty for a derivative violation, i.e., when the violation of one requirement directly results in the violation of a second requirement. For example, the failure to perform weekly inspections results in the failure to maintain an inspection log. Another example involves the accumulating hazardous waste for longer than 90 days without a permit. In this case, the HWB may assess a civil penalty for storing hazardous waste without a permit, but decline to assess a civil penalty for the failure to submit a permit application.

C. CIVIL PENALTY DETERMINATION

1. GRAVITY-BASED COMPONENT

The gravity-based component is the measure of the seriousness of a violation. The gravity-based penalty amount consists of two components: the potential for harm and the extent of deviation from the HWA or HWMR.

a. Potential for Harm

The HWA and HWMR are intended to prevent harm to human health or environment. Some violations of the HWA or HWMR create the potential for direct harm (risk of exposure) to human health or environment (e.g., the violation of prohibitions on land disposal). Other violations create the potential for harm to human health or environment by jeopardizing the integrity of the regulatory program (e.g. prepare land disposal restriction notifications, maintain records, obtain permits). Finally, some violations create the potential for both types of harm (e.g., failure to follow a permit or conduct inspections).

The HWB evaluates the potential for harm to human health or environment by considering the following factors:

1) Risk of Exposure

The potential for harm to human health or environment depends on the probability and seriousness of exposure of a human or environmental receptor to a pollutant. Actual harm is not necessary. A violator cannot always control whether the violation will result in actual harm. A violator who, by chance, does not cause actual harm should not be rewarded with a lower civil penalty.

a) Probability of Exposure

Where a violation involves the actual management of waste, the penalty should reflect the probability that the violation caused or could have caused a release of hazardous waste or constituents or hazardous conditions posing a threat of exposure to hazardous waste or constituents. In determining the likelihood of exposure, HWB considers whether the violation compromised or could have compromised the integrity of a procedure, process, or facility. Evidence of an actual or potential exposure includes:

- (1) detection of a hazardous waste or constituent in environmental media;
- (2) mismanagement of hazardous waste (e.g., rusting or open drums); and
- (3) inadequate provisions for the detection of a release of a pollutant (e.g., inadequate or lack of inspections or monitoring equipment).

b) Seriousness of Exposure

The penalty should reflect the seriousness of exposure that would result if the hazardous waste or constituents were in fact released to the environment. In determining the seriousness of exposure, the HWB considers the following factors:

- (1) the amount and toxicity of the waste actually or potentially released, including the synergistic effect of multiple pollutants;
- (2) the mobility of the pollutant(s) or the likelihood of transport by environmental media; and

(3) the proximity and sensitivity of actual or potential receptors (e.g., human populations, domestic animals, fish, wildlife, crops, vegetation) and sensitive environmental media (e.g., wetlands, drinking water supplies, useable groundwater).

2) Harm To Regulatory Program

Every requirement of the HWA and HWMR is fundamental to the integrity of the regulatory program. The violation of these requirements has the potential to undermine the HWA and HWMR, and may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the hazardous waste program and preclude the HWB from determining whether a violator is complying with other applicable requirements. Such violations may have serious implications and merit substantial penalties where the violation undermines the regulatory program. Some examples of regulatory harm violations that are fundamental to the overall program goals of safe and responsible hazardous waste management include:

- (1) failure to make a notification of hazardous waste activity;
- (2) failure to obtain a permit;
- (3) failure to ensure delivery of hazardous waste to an appropriate facility
- (4) failure to retain required records; and
- (5) failure to comply with the land disposal restrictions.

3) Evaluating the Potential for Harm

The HWB evaluates each violation to determine the degree of potential harm by each category: exposure risk and regulatory harm. The HWB uses the following categories when evaluating the potential for harm:

MINOR: The violation: 1) poses or may pose a relatively low potential for exposure to human or environmental receptors; and/or 2) does not undermine or minimally undermines the regulatory program.

MODERATE: The violation: 1) poses or may pose a significant potential for harm to human or environmental receptors; and/or 2) significantly undermines the regulatory program.

MAJOR: The violation: 1) poses or may pose a substantial potential for harm to human or environmental receptors; and/or 2) substantially undermines the regulatory program.

b. Extent of Deviation

The HWB considers the degree that a violation deviates from or renders inoperative a requirement of the HWA or HWMR. For any violation, the extent of potential noncompliance may range from substantial compliance with the requirement to total disregard of the provisions of the requirement. When evaluating the extent of deviation, the HWB may weigh the noncompliant condition against the scope and intent of the specific section of the statute or regulation rather than just the individual requirement. The HWB uses the following categories

when evaluating the extent of deviation:

MINOR: The violation deviates somewhat from a regulatory or statutory requirement but the violator substantially complies with the most (or all) important aspects of the requirements.

MODERATE: The violation significantly deviates from an important aspect of a regulatory or statutory requirement but the violator implements most of the important aspects of the requirements.

MAJOR: The violation substantially deviates from the regulatory or statutory requirement, violates multiple elements of the requirement, or violates the most important element(s) of the requirement to such an extent that substantial noncompliance results.

Generally where a single act or set of facts results in multiple violations or counts, the HWB may consider adjusting the extent of deviation upward rather than assessing penalties for multiple violations or counts. An example involves noncompliant containers at a large storage area. If a few containers lack accumulation start dates, the extent of deviation might be considered minor; but, if most of the containers are open or not in good condition and improperly marked and labeled, the extent of deviation from the container management requirements would be considered major. In this instance, the HWB would not also assess a multiple count penalty based on the number of noncompliant containers. See also the discussion in Section III.C.1.d below.

c. Gravity-Based Penalty Assessment Matrices

The HWB uses the appropriate Gravity-Based Penalty Assessment Matrix in Appendix A to determine the gravity-based penalty. Each matrix has nine cells, each containing a penalty amount based on the civil penalty maximum. After determining the potential for harm and the extent of deviation, the penalty amount is selected from the appropriate cell in the matrix.

d. Multiple Violations and Multiple Counts

When a person violates the same requirement more than one time, the HWB may, in its discretion, assess a separate civil penalty for each separate violation or may use the number of violations as a multiplier for the gravity-based component. When deciding whether to adjust the penalty for multiple violations rather than multiple counts, the HWB considers whether each violation results from an independent act (or failure to act) and is substantially distinguishable from another violation for which a penalty is to be assessed. That is, a separate set of facts supports different but similar acts. The HWB also seeks penalties for multiple violations or counts when the same requirement was violated at substantially different locations or on separate occasions. For example, if multiple open hazardous waste containers managed by different individuals are found throughout a facility, separate penalties might be more appropriate than multiple counts especially if other factors such as potential for harm or duration differ significantly. However, if numerous open containers are found at one location controlled by a single individual, it may be more appropriate to adjust the extent of deviation upward rather than

applying multiple counts of the regulatory violation.

When evaluating the gravity-based penalty, the HWB takes care to assure that multiple counts are not used in addition to upward adjustments to the potential for harm or extent of deviation components without appropriate justification. The HWB may, in its sole discretion, choose to not calculate penalties (or increase counts) for recently discovered violations that occurred more than five years ago.

2. MULTIPLE-DAY COMPONENT

The multiple-day component accounts for the duration of a violation. The duration of the violation is the number of continuous days of violation minus one day. The deduction of one day accounts for the first day of violation, which is assessed as the gravity-based penalty amount. The HWB decides in its sole discretion whether a violation is continuous.

The HWB assesses a civil penalty for the number of days of violation supported by credible evidence, including statements by facility employees. For a violation that persists beyond the day it is identified, the HWB may determine that a person or facility continuously violated a requirement from the first day of violation until the person or facility demonstrates compliance through credible evidence. Where there is a lack of physical documentation, admission by a facility employee that a violation existed for a certain number of days might constitute credible evidence of a violation's duration.

Where the HWB determines that a violation occurred for more than one day, the penalty may be calculated for a period ending: (1) on the date of the inspection, (2) on the date of compliance, or (3) on the date of the enforcement action. After establishing the number of days of violation, the HWB determines whether the multiple-day penalty is mandatory, appropriate, or discretionary for a given gravity-based classification (potential for harm vs. extent of deviation), and selects the appropriate multiplier from the multiple-day penalty matrix.

a. Multiple-Day Penalty Application

When deciding to apply a multiple-day penalty, the HWB considers the impact on the overall penalty. The factors are considered include:

- (1) will the penalty deter the violator from future violations, and
- (2) is the penalty appropriate for the violation.

A multiple-day penalty is mandatory for days 2-60 for a violation with the following gravity-based classifications: (1) Major-Major; (2) Major-Moderate; and (3) Moderate-Major. In these cases, multiple-day penalties will be sought for all or a portion of the time the violation existed.

A multiple-day penalty is presumed appropriate for days 2 through 60 for a violation with the following gravity-based classifications: (1) Major-Minor; (2) Moderate-Moderate; and (3)

Minor-Major. In these cases, multiple-day penalties should be sought unless case-specific evidence demonstrates that the violation did not continue for days 2 through 60.

A multiple-day penalty is discretionary for all days for a violation with the following gravity-based classifications: (1) Moderate-Minor; (2) Minor-Moderate; and (3) Minor-Minor.

The Multiple-Day Penalty Application Matrix in Appendix A summarizes this general guidance for the first 60 days of a violation. A multiple-day penalty is discretionary for days 61 and beyond for any violation. The HWB may, in its sole discretion, choose to assess a multiple-day penalty for each day a violation occurred or for a portion of the total days.

b. Multiple-Day Penalty Assessment Matrix

The HWB uses the appropriate Multiple-Day Penalty Assessment Matrix in Appendix A to determine additional penalties for multiple-day violations. The dollar figure to be multiplied by the number of days of violation will generally be selected from the range provided in the appropriate multiple-day cell. The figure selected should not be less than the lowest number in the range provided. Selections of a dollar figure from the range of penalty amounts can be made in the HWB's discretion based on an assessment of case-specific factors. For example, when assessing a multiple-day penalty for a moderate-major violation of a HWMR requirement that lasted 60 days, the HWB may choose to assess a penalty of \$2,400 per day for days 2 through 10 and \$1,000 per day for days 11 through 30 and \$600 per day for the next 30 days. The HWB also retains discretion to impose multiple-day penalties of up to the applicable statutory maximum for each day, when appropriate under the circumstances to achieve deterrence.

3. ADJUSTMENT FACTORS

The HWB, in its discretion, considers various factors which allow adjustments to the civil penalty to reflect legitimate differences between violations of the same requirement by different violators. The HWB applies the adjustment factors to the preliminary deterrent amount. The default range for each adjustment factor is specified in Appendix B. When adjustment factors result in a calculated penalty in excess of the statutory maximum, the statutory maximum shall be assessed.

a. Effort to Comply

Effort to comply refers to the violator's response to the violation once detected or brought to its attention. The HWB may apply a downward adjustment for a violator's good faith effort to comply with the requirement, to mitigate or prevent harm from the violation, or for self-reporting the violation and voluntarily implementing corrective action. The HWB may apply an upward adjustment for a violator's delay or refusal to take such action. Such delay or refusal may constitute bad faith when the violator knew or should have known about the violation or when the violation poses a threat to human health or environment. For violations involving bad faith, the HWB may apply an upward adjustment larger than specified by the penalty calculation worksheet.

b. Negligence / Willfulness

Negligence/willfulness refers to the violator's culpability for violating the requirement. Negligence means an action that results from the failure to use such care as a reasonable and prudent person would use in similar circumstances. The HWB may apply an upward adjustment for a violation that is negligent or willful. The HWB determines the upward adjustment by evaluating the following factors:

- (1) the violator's degree of control over the event giving rise to the violation;
- (2) the foreseeability of the event giving rise to the violation;
- (3) the reasonable precautions that the violator could have undertaken to prevent or mitigate the event giving rise to the violation;
- (4) the violator's knowledge, or obligation to obtain knowledge, regarding the requirement;
- (5) the violator's knowledge, or obligation to obtain knowledge, regarding the possibility of violating the requirement;
- (6) the violator's level of sophistication regarding compliance with the requirement; and
- (7) the level of sophistication in the industry regarding compliance with the requirement.

The violator's knowledge regarding the requirement may result in an upward adjustment, but the violator's lack of knowledge regarding the requirement does not excuse the violation because ignorance of the law is not a defense to liability. The HWB may refer for criminal prosecution any violation for which there is evidence of a willful violation or reckless disregard for human health or environment.

c. History of Noncompliance

History of noncompliance refers to the violator's previous compliance with environmental laws during the preceding ten years. The HWB may apply an upward adjustment for a history of noncompliance. The HWB determines the upward adjustment by evaluating the following factors:

- (1) repeat violations of the same or similar requirement;
- (2) previous violations of any requirement of the HWA and HWMR, including permit and order requirements;
- (3) the frequency and severity of the previous violations; and
- (4) the violator's response to the previous violations in regard to correction of the problem.

A prior violation demonstrates that the violator was not deterred by enforcement action. To avoid an upward adjustment, the violator must demonstrate, through credible evidence, that the notice of violation or compliance order was rescinded or the violation was beyond the control of the violator (e.g., a tornado resulted in a release).

For the purposes of this Policy, the HWB considers a repeat violation to be one that has occurred at the same facility within the past five years and is not part of a series of same or similar violations by the facility's parent organization that occurred within the past ten years.

The HWB may, in its discretion, also consider previous violations of a requirement of another environmental regulatory program when assessing an adjustment for history of noncompliance.

d. Other Factors

1) Self-Reporting

The HWB may adjust a civil penalty for environmental violations detected during voluntary self-evaluation, disclosure, correction and prevention. Under this discretionary factor, regulated entities are sometimes eligible for a reduction or total elimination of the gravity-based component of the civil penalty dependent on case-specific evaluation by the HWB. This factor may be used to increase the default downward effort-to-comply adjustment for self-reported violations, or be applied separately. However, a downward adjustment generally will not be applied if self-reporting is required by the HWA, HWMR, or other enforceable requirement.

2) Small Businesses

The HWB may adjust or decline to assess a civil penalty against a small business when a good faith effort to correct the violation, the violation does not involve criminal action, or the violation does not create a serious or immediate threat to human health or environment.

3) Unique Factors

The HWB may adjust or decline to assess a civil penalty when other unique factors. For example, the HWB may make a downward adjustment under this discretionary factor when evidentiary weaknesses in its case would make it unlikely that the HWB would be able to obtain through litigation the amount of the penalty it would have normally calculated using this Policy.

4. FINANCIAL CONDITION

The HWB may consider the violator's financial condition to achieve a deterrent civil penalty. Financial condition refers to a violator's ability to pay a civil penalty, taking into account its size and solvency. A violator's inability or limited ability to pay must be demonstrated with auditable financial documents.

To be an effective deterrent, a civil penalty should be matched to the size of the violator, with larger violators being assessed a larger penalty. In essence, the civil penalty should be large enough to change the violator's perception of the risk attendant in violating the law. The HWB may consider the parent corporation's size when assessing a civil penalty to its subsidiary. The HWB may use its discretion in choosing an appropriate method for calculating the ability to pay, including the EPA ABLE Model.

5. ECONOMIC BENEFIT OF NONCOMPLIANCE

The HWB considers the economic benefit of noncompliance when appropriate under the circumstances to achieve deterrence. The economic benefit of noncompliance includes delayed and avoided costs. The HWB adds the economic benefit of noncompliance to the adjusted preliminary deterrent amount to determine the total civil penalty.

a. Delayed Cost

A delayed cost is an expenditure that the violator has deferred by violating the requirement. The economic benefit of a delayed cost is the interest on the dollar amount of the deferred expenditure for the length of time of the violation. For instance, a person or facility that fails to install emergency equipment eventually will have to pay the cost of installation. By delaying the cost of installation, the person or facility achieves an economic benefit equal to the interest on the deferred expenditure. Examples include: failure to prepare contingency plans, failure to train employees, failure to implement permit requirements, failure to perform hazardous waste determinations, failure to install decontamination equipment; and failure to submit permit applications.

b. Avoided Cost

An avoided cost is an expenditure that the violator will never incur by violating the requirement. The economic benefit of an avoided cost is the expenditure that the violator would have incurred to comply with the requirement, plus the interest on the dollar amount of the deferred expenditure for the length of time of the violation. For instance, a person or facility that fails to install (or installs and then disconnects or does not maintain) emergency equipment will never have to pay the cost of maintaining the equipment, and will achieve an economic benefit equal to the avoided cost and the interest on any deferred expenditure. Examples include: failure to properly treat and dispose of hazardous waste, failure to employ a sufficient number of trained employees; failure to conduct waste analyses; failure to conduct required environmental monitoring; and failure to keep records and report data.

c. Wrongful Profit

A wrongful profit is a profit (or additional profit) earned by violating the requirement. For instance, a violator may earn a profit by disposing of untreated hazardous wastes in a municipal landfill rather than sending the wastes to treatment and disposal facilities permitted to manage hazardous waste, yet bill customers for a hazardous waste management surcharge.

d. Calculation of Economic Benefit

The HWB may use its discretion in choosing an appropriate method for calculating the economic benefit of noncompliance, including the EPA BEN Model. Regardless of the method used, the basis for the calculation of the economic benefit of delayed and avoided costs or wrongful profit must be documented.

Some violations have no or minimal economic benefit to the violator. In the interest of simplifying and expediting enforcement, the HWB may decline to calculate the economic benefit of noncompliance for such violations. The HWB does not usually add the economic benefit adjustment if the violation resulted in a benefit of less than \$2,500.

VII. SETTLEMENT

The Policy encourages settlement at any time during an enforcement action, provided the settlement is consistent with the objectives and requirements of the HWA and RCRA and the provisions of this Policy. The violator may request a settlement conference to provide information regarding liability for the violation or the amount of the civil penalty.

The HWB may adjust the civil penalty on the basis of such information. However, the HWB should ensure that the settlement penalty recovers the economic benefit of noncompliance and a significant portion of the preliminary deterrent amount.

The violator and the regulated community must perceive that the civil penalty places the violator in a worse position than a person who complies with the requirement. When adjusting a civil penalty to arrive at a final settlement, the HWB must consider that a civil penalty that is lower than the economic benefit of noncompliance punishes a person who complies with the requirement by placing him at a competitive disadvantage. Moreover, a penalty that is lower than the preliminary deterrent amount undermines the deterrent effect of the civil penalty.

The settlement process does not affect or delay the violator's obligation to comply fully and promptly with the requirement. In the event that the settlement conference affects or delays full and prompt compliance with the requirement, the HWB may apply an upward adjustment to the civil penalty.

A. SETTLEMENT PROCESS

1. ESTABLISHING SETTLEMENT POSITION

The HWB may establish a settlement position lower than the civil penalty calculated under the Policy. The HWB establishes a settlement position by evaluating the following factors:

- (1) the maximum civil penalty likely to be awarded by a administrative or judicial tribunal;
- (2) any information obtained by the HWB, including any new information provided by the violator; and
- (3) the risk of litigation.

The HWB does not consider the following factors in determining the risk of litigation:

- (1) the desire or philosophy to avoid litigation or precedential issues;
- (2) existing environmental contamination;

- (3) delay in the HWB's enforcement action; or
- (4) the HWB's past decision to forego enforcement or civil penalty for the same or similar violation.

2. RECALCULATING CIVIL PENALTY

The HWB recalculates the civil penalty whenever it obtains new information affecting the basis for the civil penalty. The HWB may, in arriving at a final settlement penalty, deviate significantly from the penalty amount sought in an administrative complaint, provided such discretion is exercised in accordance with the provisions of this Policy.

While new information often is mitigative and leads to a lower penalty, the following types of information may lead to an increased penalty:

- (1) the violation is more serious than previously believed;
- (2) additional violations or multiple days of violation have occurred;
- (3) the violator's remedial measures are inadequate or ineffective;
- (4) the violator's history of noncompliance is more extensive than previously believed;
- (5) the violator is more sophisticated regarding compliance with the requirement than previously believed; or
- (6) the violation was found to be willful.

B. DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT

The HWB uses penalty calculation worksheets and accompanying narrative explanations to document all penalties (for examples, see Appendix C). Until settlement discussions or the pre-hearing information exchanges occur with the violator, mitigating and equitable factors and overall strength of the Department's enforcement case may be difficult to assess. The HWB considers such penalty calculation documents its initial settlement position. Once the violator has presented the HWB with its best arguments relative to penalty mitigation, the HWB may, in its discretion, document a final penalty settlement amount using a revised worksheet and narrative explanation or an analogous penalty calculation summary which provides the rationale for the final settlement amount to be included in the case file.

VIII. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

A supplemental environmental project (SEP) is defined as an environmentally beneficial project which a violator voluntarily agrees to undertake in settlement of an enforcement action, but which is not legally required by law. The HWB may consider a violator's proposal for a SEP in lieu of a portion of the civil penalty calculated under this Policy when such project achieves a significant protection or improvement for public health or environment. Generally the HWB only considers a SEP proposal when the civil penalty exceeds \$25,000 and the monetary penalty reduction does not exceed 50 percent of the final civil penalty regardless of the actual cost of the SEP. However, the HWB may, in its sole discretion, agree to accept any portion of the civil

penalty in performance of a SEP. Stipulated penalties for violations of enforcement settlement agreements and consent decrees may not be mitigated by SEPs.

When determining whether to accept a SEP in settlement of an enforcement action, the HWB considers whether the proposal:

- (1) is consistent with the EPA SEP Policy and EPA Region 6's implementing guidance;
- (2) is consistent with or advances the HWA and RCRA;
- (3) has an adequate nexus to the violation as determined in HWB's sole discretion;
- (4) involves the management or administration of the project or funds by the Department; and
- (5) benefits the community or environment potentially impacted by the violation.

A. SEP CATEGORIES

A SEP generally should fit into one or more of the following categories:

- (1) a Public Health SEP that provides diagnostic, preventative, or remedial action to a human population harmed or potentially harmed by the violator;
- (2) a Pollution Prevention SEP that prevents the generation of pollution by reducing the amount or toxicity of a hazardous substance during the production process;
- (3) an Environmental Protection SEP that enhances protection of the environment by decreasing the amount or toxicity of a hazardous substance already generated or by implementing enhanced management of hazardous substances to reduce long-term pollution risks;
- (4) a Renewable Energy SEP that reduces the need for energy generated from conventional fuels or reduces or eliminates dependency upon traditional energy sources and consequently reduces emissions or wastes associated with conventional power production or use;
- (5) an Environmental Restoration SEP that enhances the condition of the ecosystem or geographic area adversely affected by the violation, provided the project exceeds the violator's existing obligation to conduct corrective action;
- (6) an Environmental Compliance SEP that provides training or technical support to members of the regulated community or regulators regarding HWA and RCRA requirements; or
- (7) an Environmental Assessment or Audit SEP that is an internal or independent systematic review, investigation or evaluation of all or part of a violator's environmental program(s).

B. SEP BENEFIT EVALUATION

In addition to evaluating a SEP's acceptability in relation to the conditions described above, the HWB evaluates a SEP's benefit in light of:

- (1) benefits to public health or the environment;
- (2) pollution prevention;
- (3) environmental justice; and
- (4) multimedia impacts.

Ideally a SEP should involve minimal project management or administration of the funds by the Department. The HWB may reduce the mitigation value for any SEP if the Department must allocate significant resources to monitor or review the implementation of the SEP.

IX. RELEASE OF INFORMATION

The Inspection of Public Records Act (IPRA), NMSA 1978 Section 14-2-1 *et seq.*, and the Department's *Inspection of Public Records Policy* govern the release of public records relating to civil penalties to any person. Public records relating to civil penalties include this Policy and documentation supporting the violations. In determining whether public records relating to civil penalties are exempted by the IPRA, the HWB consults with the Department's Office of General Counsel.

As authorized by the IPRA, the Department may withhold public records containing evidence received or compiled in connection with a criminal investigation or prosecution; or protected by the attorney-client, attorney-work product, or deliberative process privileges.

The Department may waive any exemption and release exempted public records if the public interest outweighs the harm to the Department. Such discretionary waiver will be made on a case-by-case basis and does not affect the Department's right to claim an exemption for other public records.

X. POLICY APPROVAL

I hereby approve this Hazardous Waste Act Civil Penalty Policy.



Ron Curry
Secretary of Environment



Date

APPENDIX A

DEFAULT GRAVITY-BASED PENALTY ASSESSMENT MATRIX FOR HWA, HWMR, PERMIT VIOLATIONS

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|----------|---------|
| Potential for Harm | | Major | Moderate | Minor |
| | Major | \$10,000 | \$9,000 | \$7,500 |
| | Moderate | \$6,000 | \$5,000 | \$3,500 |
| | Minor | \$2,000 | \$1,300 | \$600 |

MULTIPLE-DAY PENALTY APPLICATION MATRIX

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|---------------|---------------|
| Potential for Harm | | Major | Moderate | Minor |
| | Major | Mandatory | Mandatory | Appropriate |
| | Moderate | Mandatory | Appropriate | Discretionary |
| | Minor | Appropriate | Discretionary | Discretionary |

DEFAULT MULTIPLE-DAY PENALTY ASSESSMENT MATRIX FOR HWA, HWMR, PERMIT VIOLATIONS

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|----------------|----------------|
| Potential for Harm | | Major | Moderate | Minor |
| | Major | \$5,000 to 1,000 | \$4,500 to 900 | \$3,750 to 700 |
| | Moderate | \$2,400 to 600 | \$2,000 to 500 | \$1,400 to 350 |
| | Minor | \$600 to 200 | \$390 to 130 | \$180 to 100 |

**GRAVITY-BASED PENALTY ASSESSMENT MATRIX
FOR COMPLIANCE ORDER VIOLATIONS**

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|----------|----------|
| | | Major | Moderate | Minor |
| Potential for Harm | Major | \$25,000 | \$22,500 | \$18,750 |
| | Moderate | \$15,000 | \$12,500 | \$8,750 |
| | Minor | \$5,000 | \$3,250 | \$1,500 |

MULTIPLE-DAY PENALTY APPLICATION MATRIX

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|---------------|---------------|
| | | Major | Moderate | Minor |
| Potential for Harm | Major | Mandatory | Mandatory | Appropriate |
| | Moderate | Mandatory | Appropriate | Discretionary |
| | Minor | Appropriate | Discretionary | Discretionary |

**MULTIPLE-DAY PENALTY ASSESSMENT MATRIX
FOR COMPLIANCE ORDER VIOLATIONS**

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|-------------------|------------------|
| | | Major | Moderate | Minor |
| Potential for Harm | Major | \$12,500 to 2,500 | \$11,250 to 2,250 | \$9,375 to 1,750 |
| | Moderate | \$6,000 to 1,500 | \$5,000 to 1,250 | \$3,500 to 875 |
| | Minor | \$1,500 to 500 | \$975 to 325 | \$450 to 250 |

**GRAVITY-BASED PENALTY ASSESSMENT MATRIX
FOR IMMINENT HAZARD ORDER VIOLATIONS**

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|----------|---------|
| | | Major | Moderate | Minor |
| Potential for Harm | Major | \$5,000 | \$4,500 | \$4,000 |
| | Moderate | \$3,500 | \$3,000 | \$2,500 |
| | Minor | \$2,000 | \$1,500 | \$1,000 |

MULTIPLE-DAY PENALTY APPLICATION MATRIX

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|---------------|---------------|
| | | Major | Moderate | Minor |
| Potential for Harm | Major | Mandatory | Mandatory | Appropriate |
| | Moderate | Mandatory | Appropriate | Discretionary |
| | Minor | Appropriate | Discretionary | Discretionary |

**MULTIPLE-DAY PENALTY ASSESSMENT MATRIX
FOR IMMINENT HAZARD ORDER VIOLATIONS**

| | | Extent of Deviation | | |
|-----------------------|----------|---------------------|----------------|----------------|
| | | Major | Moderate | Minor |
| Potential for Harm | Major | \$2,500 to 500 | \$2,250 to 450 | \$2,000 to 400 |
| | Moderate | \$1,750 to 350 | \$1,500 to 300 | \$1,250 to 250 |
| | Minor | \$1,000 to 200 | \$750 to 150 | \$500 to 100 |

APPENDIX B

DEFAULT ADJUSTMENT FACTOR MATRIX

The Hazardous Waste Bureau (HWB) may consider the percentages in the following matrix to determine appropriate adjustments under the *Hazardous Waste Civil Penalty Policy* for violations of the Hazardous Waste Management Regulations (HWMR). The percentages listed are intended as guidelines. The HWB, in its discretion, may select an adjustment within the general ranges listed below depending on case-specific circumstances. In adjusting the civil penalty based on effort to comply, negligence/willfulness, and history of noncompliance, the HWB shall have the discretion to adjust the civil penalty in accordance with the provisions of the Policy.

| Adjustment Factors | Default Adjustment |
|---|--------------------|
| A. Effort to Comply | |
| Self-Reported and Corrected Violation | -25 to -50% |
| Excellent Cooperation | -15% |
| Good Cooperation | -5% |
| Cooperation | 0 |
| Recalcitrant Cooperation | +5% |
| No Cooperation | +15% |
| | |
| B. Negligence / Willfulness | |
| Not Negligent or Willful | 0 |
| Minor Negligence | +5% |
| Significant Negligence | +10% |
| Substantial Negligence | +15% |
| Probably Willful | +25% |
| | |
| C. History of Noncompliance | |
| No History of Noncompliance with HWMR | 0 |
| Minor History of Noncompliance with Different HWMR ¹ | +5% |
| Minor History of Noncompliance with Same or Similar HWMR ² | +10% |
| Significant History of Noncompliance with Different HWMR ¹ | +15% |
| Significant History of Noncompliance with Same or Similar HWMR ² | +20% |
| Substantial History of Noncompliance with Any Regulations ¹ | +25% |

1. Generally only violations within the past 10 years are considered.

2. Generally only the same or similar violations within the past 5 years are considered.

APPENDIX C

EXAMPLE PENALTY CALCULATION WORKSHEET AND NARRATIVE

Violation # 1

Facility: XYZ Corp Santa Fe Waste Management Center

Date violation observed: 7/1/2006

Citation/Violation: permit condition 5.2.3, incorporating 40 CFR 264.195(b)(1)

Failure to inspect cathodic protection of UST annually

Location: permitted storage facility

PENALTY AMOUNT:

| | | |
|-----|--|-----------|
| 1. | Gravity based penalty from matrix | \$ 5,000 |
| | (a) Potential for harm | moderate |
| | (b) Extent of deviation | moderate |
| | (c) Number of counts | 3 |
| 2. | Multple count adjustment (multiply line 1 by counts)..... | \$ 15,000 |
| 3a | Multiday penalty from matrix | \$ 2,000 |
| 3b | Days of noncompliance (or other appropriate number) | 10 |
| 3c | Multiday adjustment (multiply line 3b minus 1 by line 3a)..... | \$ 18,000 |
| 4a | Multiday penalty from matrix | \$ 500 |
| 4b | Days of noncompliance (or other appropriate number) | 20 |
| 4c | Multiday adjustment (multiply line 4b by line 4a) | \$ 10,000 |
| 5a | Multiday penalty from matrix | |
| 5b | Days of noncompliance (or other appropriate number) | |
| 5c | Multiday adjustment (multiply line 5b by line 5a) | \$ - |
| 6. | Add lines 2, 3c, 4c, and 5c..... | \$ 43,000 |
| 7. | Percent increase/decrease for good faith | 0% |
| 8. | Percent increase for willfulness/negligence | 15% |
| 9. | Percent increase for history of noncompliance | 15% |
| 10. | Total percentage (add lines 7 through 9) | 30% |
| 11. | Multiply line 6 by line 10 | \$ 12,900 |
| 12. | Economic benefit penalty | \$ - |
| 13. | Add lines 6, 11, and 12 for total penalty amount for this violation | \$ 55,900 |

Violation # 1: XYZ Corp. failed to perform the annual cathodic protection testing requirements on a hazardous waste storage tank. XYZ Corp. was unable to document in the facility operating record that annual inspections were performed to ensure the cathodic protection system was properly operating to detect any corrosion or releases of waste solvent from a 15,000-gal underground storage tank since 2002. This is a violation of Permit Condition 5.2.3, referring to 40 CFR 264.195(c)(1).

1. Gravity-Based Penalty:

(a) Potential for Harm: Moderate. The potential for harm to the human health and environment for this violation would normally be substantial due to the following facts: a) depth to ground water is shallow at this location (less than 100 ft.); b) tank system, if it leaked, could potentially release 15,000 gallons of hazardous waste solvents into the soil and eventually into the ground water; c) the soil in this area is known to be extremely corrosive; d) the design of this tank is single-walled steel, and, therefore, much more susceptible to corrosion if the corrosion protection system were to fail, e) the tank was installed in October 1997, and f) the cathodic protection system was last tested in September 2002, i.e., it had been approximately 4 years at the time of the inspection since system was tested. However, NMED acknowledges that the following mitigating circumstances existed: a) the system was designed with a fiberglass-reinforced plastic coating to aid in preventing corrosion as well as the sacrificial anode system; b) XYZ Corp. also installed an automatic tank gauge system that would alarm if there were a sudden release above a certain leak rate; and c) the staff conduct all required inspections of the tank system. While these mitigating conditions help reduce to potential for harm somewhat, the potential for a release, especially a slow release over an extended period of time, is still significant.

In addition to the potential for harm to humans or the environment, the NMED finds that failure to follow a permit condition directly intended to protect against releases of large quantities of liquid hazardous waste causes significant the harm to the regulatory program.

(b) Extent of Deviation: Moderate. XYZ Corp.'s operating permit requires compliance with 40 CFR 264 subpart J requirements for the hazardous waste tank. XYZ Corp. installed the cathodic protection system at the recommendation of a corrosion expert. The NMED considers the requirement for a cathodic protection system to be an integral element of the tank requirements especially considering the amount and nature of the hazardous waste being stored in the tank and the other concerns noted above. Consequently, the requirement for testing the cathodic protection system is a key quality assurance mechanism to ensure that the system continues to operate properly. The NMED finds that XYZ Co.'s disregard for this testing requirement for the last 4 years is a significant deviation from the tank requirements in the permit.

(c) Counts: Three. The cathodic protection system testing should have been conducted annual. At the time of the inspection in July 2006, XYZ Co. was unable to demonstrate that

this testing had been performed since 2002. Since this violation was repeated for 3 years (2003-2005; 2006 was not counted since the year had not yet ended at the time of the inspection), NMED assesses a penalty for 3 counts in this case.

2. **Multiday Penalty:** Forty days. A multiday penalty is appropriate for a moderate-moderate gravity-based penalty. for the purposes of this violation, the NMED counts each missed annual testing as one day. Even though the cathodic protection system has not been tested for almost 4 years, NMED has determined that a multiday penalty for the full time is not warranted in this case. The applicable multiday penalty matrix cell ranges from \$500 to \$2000 per day. Considering other factors used to derive the penalty for this violation, the NMED has determined that a multiday penalty based on using the maximum amount (\$2000/day) for 10 days (minus 1) and the minimum amount (\$500/day) for an additional 30 days would result in a total penalty with sufficient deterrent impact.
3. **Good Faith:** None. XYZ Corp. is a nationwide waste management company that holds a hazardous waste permit from the NMED. As a result, XYZ Corp. should be well aware of the hazardous waste regulations and its permit conditions. Since XYZ Corp. did not identify this violation, there is no adjustment of the penalty downward based on good faith.
4. **Willfulness/Negligence:** 15%. XYZ Corp. was aware of the regulatory requirements to insure the tanks are operating according to its design. Yet XYZ Corp. failed to perform annual cathodic protection system for 3 years. In addition, XYZ Corp.'s QA program failed to identify this oversight of a permit condition. As a result, the NMED finds that XYZ Corp. exhibited substantial negligence in this case.
5. **History of Noncompliance:** 15%. A review of XYZ Corp.'s compliance history showed that XYZ Corp. has not been cited for a similar underground storage tank violation in the past. However, the NMED has cited XYZ Corp. for numerous other hazardous waste violations, including other permit conditions, during the past 10 years. As a result, the NMED finds that XYZ Corp. has some significant history of noncompliance with hazardous waste regulations.
6. **Economic Benefit:** Insignificant. XYZ Corp. avoided the cost of annually testing the hazardous waste storage tank for 3 years. Using an estimated cost of \$150 per test, the NMED estimates that XYZ Co. obtained an economic benefit of approximately \$450 in avoided costs plus interest. However, the NMED chose not to assess an economic benefit adjustment in this case.

